No. 11091

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

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BRIEF FOR THE UNITED STATES

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Assistant Attorney General.
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A. F. PRESCOTT,
JOHN W. FISHER,
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INDEX

CITATIONS

Cases:

Page

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OPINION BELOW

The opinion of the District Court (R. 17) is reported in 59 F. Supp. 619. The District Court also wrote an opinion denying the taxpayer's petition for reconsideration (R. 29) which was not reported.

JURISDICTION

This is a suit by the United States under Section 3744 of the Internal Revenue Code to collect social security taxes for the year 1938 in the amount of $571.33, plus interest. (R. 2-3) The judgment of the District Court

was entered April 6, 1945. (R. 34.) Notice of appeal was filed June 20, 1945. (R. 34-35.) The jurisdiction of this Court rests on Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the services rendered by certain employees of the taxpayer constituted "agricultural labor" within the meaning of Section 907(c) of the Social Security Act.

STATUTE AND REGULATIONS INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

> SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> * * * * * *
>
> (3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U.S.C. 1940 ed., Sec. 1101.)
>
> SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the tax-

able year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U.S.C. 1940 ed., Sec. 1102.)

SEC. 907. When used in this title—

* * * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

* * * * * *

(42 U.S.C. 1940 ed., Sec. 1107.)

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 206(1). *Agricultural labor.*—The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor", however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards.

Forestry and lumbering are not included within the exception.

STATEMENT

The District Court found that during 1938 the taxpayer had individuals in his employ to whom he paid total wages of $30,198.38. (R. 32.) The taxpayer filed a return under Title IX of the Social Security Act, reporting the wages paid. (R. 32.) Of the total of $30,198.38 so paid and reported, the sum of $22,705.08 was paid as wages for services which were not agricultural labor but were of a commercial character and in the

field of industrial activity and were performed within the United States by an employee for his employer and were covered by provisions of Title IX of the Social Security Act. (R. 32-33.) The sum of $22,705.08 is subject to the tax thereon at the rate of three per cent in the amount of $681.15. The taxpayer paid $68.11 on January 26, 1939, on account of the tax, and is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the sum of $41.71, leaving a balance of $571.33 unpaid and owing to the United States as of January 26, 1939. (R. 33.)

The District Court concluded that the United States was entitled to judgment against the taxpayer for $571.33, with interest and costs, and directed the entry of judgment accordingly. (R. 33.) The taxpayer's appeal is from the judgment so entered. (R. 34.)

The only issue raised by the taxpayer is whether the services of the employees with respect to which the tax was imposed were agricultural labor within the meaning of the applicable statute. (Br. 7.)

The facts pertaining to the services were stipulated. (R. 5.) The taxpayer was a farmer, owning or operating as a tenant between 800 and 900 acres of farm land near Homedale and Wilder, Idaho, on which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops). (R. 7.) He also operated, seasonally, two "processing" sheds, located off his farm lands near trackage. (R. 7.) At those sheds, he employed labor in the

work of "processing", grading and packing and marketing the produce raised on his own lands, and in doing similar work for other farmers, who paid him for the service. (R. 7, 8, 10, 11, 12, 13.)

Approximately 25 per cent of the produce "processed" was raised and owned by the taxpayer, and approximately 75 per cent thereof was raised and owned by other farmers. (R. 7.)

The labor performed on the farm or in connection therewith, except in processing, is not in issue herein. Only the labor performed off the farm, in the taxpayer's processing sheds, in processing, packing and preparing the produce for market, is involved. (R. 7, 19.)

The processing which took place at the taxpayer's sheds consisted primarily of a cleaning, sorting, grading and packing operation, and in no way changed the produce. (R. 12, 13.) The produce from the taxpayer's farming operations and the produce of the other farmers were intermingled and went through the process together. (R. 13.)

Aside from the produce raised by the taxpayer, the produce which he processed was procured in the following ways:

He purchased from the farm producer, that portion of his crop which was found to be marketable after being sorted and graded. To enable the taxpayer and the farmer to determine the part purchased and to prepare the produce for the market, the farmer delivered his

produce at the taxpayer's sheds in half bags as he took it from the field. (R. 10)

The taxpayer also handled a comparatively small part of potatoes on consignment, in which cases the farmer delivered the potatoes from the field as hervested, and after the taxpayer processed them, he sold them, and from the sale price, deducted the expense, including a charge for processing and brokerage, and paid the balance to the farmer. (R. 10.)

In the case of all produce, the culls or non-marketable produce, were owned by and went back to the farmer producer, or were disposed of as he directed and did not go to market. (R. 10.)

In the case of lettuce, peas and carrots, the taxpayer processed and sold that grown by him; and that which was not grown by him, he handled and sold only on consignment for the farmer owner, as described above in the case of potatoes. (R. 10.)

In the case of potatoes, they were delivered at the sheds, covered with dirt and intermingled with clods, vines, sticks, culls, and some bruised, cut, rotten and mis-shaped, just as dug from the ground. The potatoes were cleaned by hand of clods and vines, and were screened of dirt, then placed in a mechanical washer for cooling and washing, or sprayed with a hose. They were then placed on tables, and were hand sorted and graded and the marketable part was placed in bags, and then trucked by hand into cars, where they were packed for shipment, and the cars were iced.

In the case of onions, the same operations took place except that they were not washed. (R. 14.)

In the case of lettuce, delivery was made by the farmer in his own truck, and the taxpayer took over at the shed. (R. 14.) The processing operations consisted of trimming off the butt and surplus and broken and discolored leaves and discarding heads not suitable for the market. The marketable heads were then sorted on the tables as to size and placed in crates containing the same size heads, with ice between the layers. The crates were stamped with the number of heads, paper was folded over them, with ice on top, and the cover was nailed on. The crates were loaded into a car and ice placed over the crates in the car. (R. 14.)

In the case of peas, delivery was made into the sheds in sacks, the contents were dumped on a table, and unmarketable peas, such as those too small, ill-shaped, broken, bruised and old, were picked out by hand. The marketable peas were placed in hampers or tubs; sometimes the top layers were straightened out or "faced" to give a better appearance; the hamper was labeled; a cover was placed on it; it then went into a tank of cold water for cooling, and then into the car and was loaded and ice placed on top for refrigeration. (R. 15.)

In the case of carrots, the farmer producer graded and tied them in bunches on the farm; placed the bunches in crates, and delivered the crates to the taxpayer; the bunches were then washed, sized, packed and placed

in cars, with ice in the crates and the cars as in the case of lettuce. (R. 15.)

The processing operations were largely seasonal as to all the crops, the length of the season varying according to the crop. (R. 11.)

The taxpayer has raised no question as to the amount of tax due the Government if the labor is held subject to tax.

SUMMARY OF ARGUMENT

The Treasury Regulations are a proper construction of the term "agricultural labor". Under these Regulations, two conditions must be present in order that processing, packing and marketing of vegetables may be considered "agricultural labor". They are not agricultural labor unless (1) performed by an employee of the producing owner or tenant and (2) unless they are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Both of these conditions were not present in the case of any of the employees.

The Social Security Act should have a nation-wide construction; state laws are not controlling.

The finding of the District Court that the services were not agricultural labor but were of a commercial character and in the field of industrial activity was clearly not erroneous, and is decisive of the issue.

ARGUMENT

THE SERVICES PERFORMED BY THE TAXPAYER'S EMPLOYEES IN PROCESSING, PACKING, AND MARKETING VEGETABLES WERE PROPERLY HELD TO BE OF A COMMERCIAL CHARACTER AND NOT "AGRICULTURAL LABOR"

The provision of the Treasury Regulations that processing, packing or marketing of farm products does not constitute "agricultural labor" unless performed by an employee of the producing owner or tenant and unless such processing, packing or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations, was approved in *Chester C. Fosgate Co.* v. *United States,* 125 F. 2d 775 (C.C.A. 5th), as a practical, workable and reasonable interpretation of what should be treated as "agricultural labor", and was also referred to with approval in *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C.C.A. 5th).

The Supreme Court has in numerous cases recognized the importance of the administrative construction of a statute. In *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, the Court said (p. 349):

> It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of

> which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. * * *

To the same effect is *Brewster* v. *Gage,* 280 U.S. 327, 336.

The term "agricultural labor" was not defined in the Social Security Act, and administrative construction was obviously intended.

It is to be noted that the two conditions specified in the Regulations are in the conjunctive, so that if either is absent, the service is not "agricultural labor" within the Regulations. Both conditions are not present in the case of any of the employees here in question, and therefore none of the services involved are "agricultural labor" within the Regulations.

In *North Whittier Heights C. Ass'n* v. *National L. R. Board,* 109 F. 2d 76, certiorari denied, 310 U.S. 632, this Court had occasion to construe and apply the term "agricultural laborers" as used in the National Labor Relations Act. The laborers there involved were engaged in the work of processing, packing, and marketing citrus fruits. The employer there made the same argument as is made by the taxpayer here (Br. 12) that the nature of the work was the true test, without regard to whether it was carried on by the farmer who produced the fruit, or on a commercial scale, or under industrial conditions, and the Court was asked to conclude that nothing but the nature of the work was significant. The Court refused to accept that test. The Court said (p. 80):

> The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it.

The Court concluded that the employees there involved, whose work and working conditions were essentially similar to the work and working conditions here involved, were not "agricultural laborers" within the meaning of the statute there involved.

In *Idaho Potato Growers* v. *National Labor Rel. Board,* 144 F. 2d 295, 300, this Court again considered the meaning of "agricultural laborers" under the National Labor Relations Act and reached a similar conclusion.

We ask the Court to make the same distinction here between true agricultural labor and commercial activity. The finding of the District Court that the services were not agricultural labor but were of a commercial character and in the field of industrial activity was clearly not erroneous, and is decisive of the issue. The handling of *all* the produce from the time it was delivered to the taxpayer at the sheds was carried on by the taxpayer, not in connection with his farming activities, but in connection with and as part of the operation of his commercial enterprise of processing and marketing farm produce. These operations were not incidental to his own farming operations nor to those of the other farmers. The fact that they can be and are sometimes carried on by farmers themselves on their own farms as an incident

to farming, does not make them any less commercial in character as carried on in this case.

The lower court properly distinguished the case of *Stuart* v. *Kleck,* 129 F. 2d 400 (C.C.A. 9th), as involving work done on a farm, and not work done in the processing, packing or marketing of produce. The taxpayer argues (Br. 22-23) that the decision of the Idaho Supreme Court (*Batt* v. *Unemployment Compensation Division,* 63 Idaho 572, 123 P. 2d 1004) should be followed, that a state interpretation, rather than a nation-wide construction is warranted here. This Court rejected that view in *Matcovish* v.*Anglim,* 134 F. 2d 834, 836. The Court there was considering Section 907 of the Social Security Act, *supra,* the same section as is involved here. In that case, involving employment in California, the state court had held that the taxpayer there involved was not an employer under the state law, and this Court stated (p. 836) that it would have to hold against the tax if the state law was controlling. The Court cited *Buckstaff Co.* v. *McKinley,* 308 U.S. 358, as holding that the purpose of Congress was to have the state law as closely coterminous as possible with its own, and on the authority of that case, held that the state law was not controlling, and that the federal act must be given a nation-wide interpretation.

The principal basis for the argument of the taxpayer on this point is that the unemployment tax of Title IX involves the cooperation of the states in its administration. (Br. 23-27.) But the same definition of em-

ployment and the same exception of agricultural labor are provided under Section 811(b) of Title VIII of the Social Security Act, which does not involve such state participation. Obviously the terms should have the same interpretation under both titles, and this requires a nation-wide interpretation.

The fact that the particular employees here involved may not be benefited by the tax because of the state decision cannot be permitted to control the decision as the taxpayer argues (Br. 17), for that would be to make state decisions controlling, contrary to the decision of this Court and of the United States Supreme Court, cited above. The United States did not stipulate, as the taxpayer asserts (Br. 14, 17) that the type of work is agricultural. It was agricultural work or not, depending on the conditions under which it was done, as those conditions gave character to it. The activities were like those in *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C.C.A. 5th), where the court said (p. 160) the activities were not "per se agricultural" and were "deprived of their agricultural character by the dominance in the operation of their commercial character."

The activities here involved were all commercial in character, and therefore none constituted agricultural labor. The same rule should therefore be applied as to all the employees.

CONCLUSION

The Government urges that the judgment of the District Court should be affirmed.

Respectfully submitted,

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